U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 24 May 2004

CASE NO.: 2002-LHC-2611

OWCP NO.: 7-150551

IN THE MATTER OF

JACKSON C. JONES, JR.
Claimant

v.

TIDEWATER MARINE SERVICE, INC.
Employer

APPEARANCES:

David A. Dalia, Esq.
For the Claimant

Stephanie D. Skinner, Esq.
For the Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Jackson C. Jones, Jr., against Tidewater Marine Service, Inc. (Employer). The formal hearing was conducted in Metairie, Louisiana on March 15, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following

[1]The parties were granted time post hearing to file briefs. This time was extended up to and through April 20, 2004.

exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-10 and Employer's Exhibits 1-22. This decision is based on the entire record.[2]

Statement of the Case

This is a highly unusual claim. Claimant was born June 27, 1960. After high school, when he was about 18 years old, he went to work with Employer in October or November of 1978 and remained until terminated in 1979. It is undisputed that Claimant was hired as a deckhand and worked as a deckhand for Employer, and that when the alleged accident occurred in the end of December of 1978 or early January of 1979, Claimant was assigned to the supply boat *NORTHTIDE* where he worked shifts of seven days on and seven days off and was paid $41.00 each day he worked.

Also, it is unrefuted that during his tenure aboard the *NORTHTIDE*, Claimant slept and took his meals aboard the vessel and spent his days tying and untying the vessel, maintaining the vessel and/or chipping and painting. The mission of the vessel was that of an offshore delivery boat which off loaded and unloaded equipment and supplies to platforms in the Gulf of Mexico. Except for one alleged occasion, Claimant concedes he had no involvement with the loading or unloading process. These duties were performed by the cranes and men stationed on the platforms.

Claimant has no specific recollection about the events upon which his claim is based. According to Claimant, he had a dream some 20 years later which revealed the following events. On the night in question, the exact date being unknown, Claimant maintains that because of weather conditions the *NORTHTIDE* could not tie to the rig where it was delivering equipment and pipes. Claimant stayed awake into the night on watch while anchored some 200 yards from the rigs. After finally being relieved and going to sleep, Claimant said he was later awakened and told that the captain wanted him on the back deck to assist in the loading process by hooking the crane line to the slings embracing the equipment to be hoisted and delivered aboard the rig. Apparently, over the next few minutes, Claimant believes he managed to hook up a few loads, but was then struck by a load as the vessel bucked in the seas. According to Claimant, that virtually ends

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

his memory of the events. Next, as unusual as it sounds, Claimant's testimony is that he remembers awaking in the cabin of the vessel and then remembers being confronted by a "white woman," but when he eventually awoke in his home town of Natchitoches, Louisiana, he says he has no recollection of how or when he got there or the circumstances of any treatment he might have received.

Seemingly, Claimant's next memory is his going to work as a Parish Deputy Sheriff in 1980. Since that time he has worked for a variety of law enforcement departments, performed maintenance jobs and is now a corrections officer at a parish detention center. Aside from numerous jobs, Claimant has also had approximately nine accidents, including fights as a law enforcement officer and automobile accidents. He has been seen by six doctors over 40 occasions and has been involved in multiple lawsuits pertaining to these various accidents and disputes wherein he alleged injuries on most occasions. (RX 18).

As to his present claim, Claimant testified that his memory of the events of the alleged accident on the vessel came to him in a dream in 1998, and he reported that fact to Dr. Christopher D. Burda, a rheumatologist, on September 28, 1998. (CX 7). However, despite the fact that he has seen Dr. Burda on subsequent occasions, he has not again discussed with Dr. Burda the revelations of his dream, rather his visits with Dr. Burda and the other physicians have involved injuries he received from the various automobile accidents or assaults in which he has been involved.

Captain Steve Comeaux, now retired, testified at the hearing that he was assigned to the *NORTHTIDE* as captain in 1978 and 1979. He does not remember the Claimant, but said his crew at the time would have consisted of himself, an engineer, two deckhands and a cook. Captain Comeaux has no recollection of anyone being severely injured aboard the vessel during that time, and he was adamant that none of his crew were ever called on or allowed to assist in the loading or unloading of the vessel. His deckhands' jobs were to tie and untie ropes and performed vessel maintenance. He also identified Employer's Exhibit 17, an accident report dated January 12, 1979, showing Claimant had the flu and accompanied by a note from a Dr. Cook in Claimant's home town dated January 16, 1979, confirming the flu and Claimant's ability to return to work. The company records also show that Claimant lost contact with Employer during the spring of 1979 and he was officially terminated from the books on July 3, 1979, because of lack of contact.

Claimant's Exhibit 8 is the deposition of Stephen Solomon. He met Claimant while working as a cook on one of Employer's vessels in the late 1970's. The two worked together on and off for approximately two years and have remained friends since. Mr. Solomon says he recalls a stormy wintry night when he was watching, from the galley, pipe being unloaded from the rear of the vessel onto a rig. He did not actually see an accident "What I saw was Jackson pinned against the bulkhead. I didn't see the actual pipe swing and hit him, but I saw him pinned against the bulkhead. He came limping out. . . ." (CX 8).

Mr. Solomon believed Claimant was injured in the lower part of his body for Claimant was holding his leg and his foot when he came into the galley. After the accident, Mr. Solomon testified Claimant stayed on the boat and worked "because I don't remember him having bed rest, me taking his food up to him." (CX 8, pg. 10). In fact, Mr. Solomon thinks he worked a subsequent hitch with Claimant, and has no knowledge of an accident report nor was he ever asked anything about the event until talking recently to Claimant's attorney. Mr. Solomon said he has stayed friends with Claimant over the years and is aware that Claimant has had numerous subsequent accidents. He also has no recollection of Claimant being unconscious following this alleged accident.

Collateral Estoppel

Previously, on July 20, 1999, Claimant filed a "Disputed Claim for Compensation" with the State of Louisiana Office of Workers' Compensation against Employer wherein he made the identical allegations to those he now claims before this office. (RX 19). Following an evidentiary hearing before Judge Baddock, that claim was dismissed with prejudice based upon the finding that Claimant was a Jones Act seaman and excluded from coverage.

Claimant appealed that decision to the Louisiana Third Circuit Court of Appeals. That Court rendered a judgment affirming Judge Braddock's decision on November 7, 2001. (RX 20). The Court specifically affirmed Judge Braddock's finding that Claimant was a seaman employed aboard a vessel at the time of his alleged injury, finding "both Jones' Disputed Claim for Compensation and an affidavit introduced into evidence alleged that his accident occurred offshore. Accordingly, since Jones' injury occurred while he was a seaman on a vessel, he has no cause of action against Tidex for workers' compensation benefits." (RX 20).

In the unpublished decision of *Michael J. Hennessey vs. Bath Iron Works Corporation*, BRB No. 01-0872 (8/7/02), the Benefits Review Board set forth the general proposition of law as it pertains to collateral estoppel:

> The traditional doctrine of collateral estoppel bars re-litigation of any issue that a party had a full and fair opportunity to litigate in an earlier action and that was finally decided in that action. *DeCosta v. Viacom Int'l, Inc.,* 981 F.2d 602, 604 (1st Cir.), *cert. denied*, 509 U.S. 923 (1993). Under this principle, a party is barred from re-litigating an issue decided in prior litigation if: (1) the issues at stake are identical in both cases; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *DeCosta*, 981 F.2d 602; *see generally Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971); *Lawlor v. National Screen Service Corp.,* 349 U.S. 322 (1955); *Ortiz v. Todd Shipyards Corp.,* 25 BRBS 228 (1991). In order for collateral estoppel effect to be given to the findings of the first forum by an administrative law judge deciding a claim under the Act, the same legal standards must be applicable in both forums. *See Plourde v. Bath Iron Works Corp.,* 34 BRBS 45 (2000). Thus, collateral estoppel effect may be denied because of differences in the burden of proof. *Bath Iron Works Corp. v. Director, OWCP [Acord],* 125 F.3d 18, 31 BRBS 109 (CRT) (1st Cir. 1997). The point of collateral estoppel is that the first determination is binding not because it is right but because it is first and was reached after a full and fair opportunity between the parties to litigate the issue. *Acord*, 125 F.3d at 22, 31 BRBS at 112 (CRT).

The facts in this case appear to fall within the Board's definition. Claimant has previously litigated the identical issue in a prior claim (i.e. his status as a Jones Act seaman); the issue was litigated through trial and appealed and the resulting final decision decided the critical issue of Claimant's status as a Jones Act Seaman. Consequently, it is my finding that Claimant is barred from again re-litigating that

decided issue. Having so found, however, and out of an abundance of caution, I too will review the facts presented to me in this claim as regards Claimant's status aboard the *NORTHTIDE.*

Status

The Longshore and Harbor Workers' Compensation Act provides coverage to employees or "persons engaged in maritime employment, including any longshoreman or other person engaged in longshore operations, and any harbor worker including a ship repairman, ship builder, and ship-breaker, but such terms does not include . . . (g) a mast or member of a crew of any vessel." 33 U.S.C. 902(3). The terms "member of a crew" under the LHWCA and "seaman" under the Jones Act are synonymous. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). The LHWCA and the Jones Act are mutually exclusive, so that a "seaman" under the Jones Act is the same as a "master or member of a crew" of any vessel, and therefore excluded from coverage under the Act. *McDermott Int'l v. Wilander,* 498 U.S. 337, 26 BRBS 75 (CRT) (1991); *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7 (1946).

The first question is whether the *NORTHTIDE*, to which Claimant was assigned and worked, was a vessel. The answer is affirmative. The next inquiry is whether Claimant is considered a member of the crew and therefore excluded from receiving compensation under the LHWCA. To be classified as a seaman, the following criteria must be met. First, the workers' duties must contribute to the function of the vessel or to the accomplishment of its mission. Second, a seaman must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott Int'l v. Wilander*, 498 U.S> 337 (1991).

Claimant concedes, and the evidence supports the finding, that Claimant's duties contributed to the function of the *NORTHTIDE* in accomplishing its' mission. As held in *Chandris*, the Claimant need only show that he "does the ship's work." 515 U.S. at 368. This threshold is very broad. *Id.* In this instance, Claimant testified that he was a crew member, and I find Claimant has satisfied the first prong of the *Chandris* test.

The evidence also supports the finding that Claimant had a connection to the *NORTHTIDE* that was substantial in both duration and nature. As articulated by the *Chandris* court, "it is not the employee's particular job that is determinative of seaman status, but the employee's connection to the vessel." Claimant was

attached to the *NORTHTIDE,* and therefore, I find that Claimant's connection to the *NORTHTIDE* was substantial in duration.

The Fifth Circuit in *Endeavor Marine, Inc. v. Crane Operators,* 234 F.3d 287 (2000), found that claimant to have satisfied the "substantial in nature" inquiry. Kevin Baye worked aboard the *FRANK L*, an unmotorized barge, as a crane operator. As a tug pushed the barge alongside the cargo vessel, the *FRANK L* was assigned to unload, a mooring cable of the nearby derrick barge snagged on the *FRANK L's* hull. The line snapped and popped up onto the *FRANK L's* deck, injuring Baye. As explained by the court, Baye's connection to the *FRANK L* was substantial in nature:

> First, Baye was permanently assigned to the *FRANK L* and spent almost all of the prior 18 months on the vessel. Second, Baye's primary responsibility was to operate the cranes on board a vessel whose sole purpose is to load and unload cargo vessels. Third, in the course of his employment, Claimant was regularly exposed to perils of the sea (brown waters of the Mississippi River). For these reasons we conclude Claimant was a Jones Act seaman as a matter of law. 234 F.3d at 292.

In the instance case, Claimant was assigned to the *NORTHTIDE* and spent his working time aboard the vessel in service to the *NORTHTIDE* or its' mission. Although he may have, a fact I do not find to have been proven, participated on one isolated occasion in the unloading of the vessel, his responsibilities were associated with maintenance and upkeep of the vessel itself. In doing so, Claimant was also exposed to the perils of navigable waters. Consequently, as Claimant has satisfied both criteria of *Chandris*, I find Claimant's status to be that of a Jones Act seaman. He is not covered by the Longshore and Harbor Workers' Compensation Act for the activity he alleges.

I say "alleged" because even though I am not required to employ a "snap shot" test to determine Claimant's seaman's status at the moment of injury if he is otherwise found to be a crew member of the vessel (see *Chandris, supra*), I feel obligated to point out that the evidence does not, in my opinion, support Claimant's "dream." Claimant readily admits he was a deckhand on the *NORTHTIDE* and performed no duties involving the loading and unloading of a vessel except this one isolated event on a winter night in 1978, the surrounding facts of which came to him in a dream some 20 years later. However, the captain of the *NORTHTIDE* has no recollection of such an event, and no company records,

no medical records nor any family members have been produced to support Claimant's dream that he injured his upper body while unloading the vessel, lost consciousness, received medical treatment and spent lost months at his home in Natchitoches, Louisiana until going to work as a deputy sheriff. Claimant's only supporting witness is that of a now close friend who did not actually see the alleged accident and recalls Claimant limping into the galley complaining of an injury to his leg and foot, not his neck. Also, the witness remembers no unconsciousness on Claimant's part and in fact believes Claimant continued to work that hitch and another thereafter.

In sum, even if on some isolated, momentary and episodic occasion Claimant did participate in the unloading of the vessel, which I am not satisfied has been proven, such activity was neither sufficiently continuous nor substantially enough to remove Claimant's status as a seaman. His exclusive remedy, if indeed he has one, is as a Jones Act seaman, not a longshoreman.

ORDER

It is hereby ORDERED that Claimant's claim for benefits under the Act is DISMISSED.

So ORDERED this 21st day of May, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:kw